IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 27TH NOVEMBER 2007 / 6TH AGRAHAYANA 1929

SA.No. 745 of 1993(E)

AS.17/1987 of DISTRICT COURT,THIRUVANANTHAPURAM.
OS.895/1979 of II ADDITIONAL MUNSIFF COURT,THIRUVANANTHAPURAM.

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APPELLANTS/RESPONDENTS 2,3,4/DEFENDANTS 2,3,4.

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1. SUBHADRA, KAVUVILA PURAYIDAM,
   PATTOM, THIRUVANANTHAPURAM.

2. KAUSALYA, VILAYIL VEEDU,
   EDAVILAKAM MURI, VAILOOR VILLAGE,
   MURUKKUMPUZHA,
   THIRUVANANTHAPURAM.
3. OMANA,
   MANDAVAKUNNU PUTHUVAL PUTHEN VEEDU,
   NEAR VAVARA TEMPLE,
   POTHENCODE, THIRUVANANTHAPURAM.

BY ADV. SRI.V.N.ACHUTHA KURUP (SR.)
SRI.B.S.SWATHY KUMAR

RESPONDENT:APPELLANT/PLAINTIFF

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1. THANKAPPAN NAIR, SON OF NARAYANA PILLAI,
   RESIDING AT KAVALLOORKONAM PANAYIL VEEDU,
   NEAR MARAPPALAM, PATTOM,
   MADATHUVILAKAM, THIRUVANANTHAPURAM (DIED.LRS IMPLEADED)

ADDITIONAL RESPONDENTS 2 TO 10.

2. K.RAJESWARI, AGED 46, D/O.LATE K.THANKAPPAN NAIR,
   ASA NILAYAM, THIRUMALAYIL VETTA MUKKU, THIRUVANANTHAPURAM.
3. K.SREEKUMARI AMMA, REVI SRIYIL, KAZHAKUTTAM KIZHAKKUM
   BHAGAM, TRIVANDRUM.
4. SREEDEVI AMMA K. KAMALA BHAVAN, -DO-

5. T.MURALEEDHARAN NAIR, DO. DO.
6. K.PRASANNA KUMARI AMMA, -DO- -DO-
7. K.RADHAMANI AMMA, RAJI NIVAS, -DO-
8. T.GOPALAKRISHNAN NAIR, KAMALA BHAVAN,-DO-

9. T.SREEKUMARAN NAIR, -DO- -DO-
10. T.SREELATHA, -do- -do-

(ADDL.RESPONDENTS 2 TO 10 IMPLEADED AS THE LEGAL HEIRS OF THE DECEASED RESPONDENT AS PER ORDER DATED 8/6/99 ON CMP's 788, 789 & 790/99.)

BY ADV. SRI.M.BALAGOVINDAN
SRI.D.KISHORE
SRI.D.SAJEEV FOR R2 TO R10.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.1470/1994 IN S.A.NO.745/1993

9.4.2007 DISMISSED Sd/- M.Sasidharan Nambiar
Judge

/true copy/

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 745 OF 1993

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Dated this the 27th day of November, 2007

JUDGMENT

Defendants 2, 3 4 in O.S.895/1979 on the file of Additional Munsiff Court, Thiruvananthapuram are the appellants. Respondent is the plaintiff. The suit was filed for redemption of Ext.A1 mortgage. Plaint schedule property was mortgaged on 10.11.1951 under Ext.A1 for a period of six years. The mortgage money was Rs.600/-. Ext.A1 is styled as Otti Kuzhikanam deed. Appellants are the legal representatives of the original mortgagee. Respondent sought redemption of mortgage on deposit of the mortgage money. Appellants resisted the suit admitting Ext.A1; but contending that it is a lease and they are entitled to the protection of Kerala Land Reforms Act. It was also contended that they constructed the building spending Rs.2000/- and planted trees, reclaimed land and constructed compound walls and respondent is

therefore not entitled to redeem the mortgage. In view of the claim for tenancy, trial court referred the question of tenancy under section 125(3) of Kerala Land Reforms Act to Land Tribunal,Thiruvananthapuram. The Land Tribunal rendered a finding that appellants are entitled to the benefit of Kerala Land Reforms Act as they are protected under section 2 (39A)(a) and are tenants as under section 2 (57) of Kerala Land Reforms Act.

2. Learned Munsiff as he is bound to accepted that finding and dismissed the suit. Respondent challenged the decree and judgment before District Court, Thiruvananthapuram. Learned District Judge on reappreciation of evidence found that Ext.A1 is not a lease but a mortgage. It was found that there is an indemnity clause against any defect in title or encumbrances of the property and there is no personal convenant to pay the mortgage amount and there is no provision for realisation of the amount by sale of the property. Learned District

Judge found that extent of the property is only 14 ½ cents and the amount advanced is not small and on a reading of Ext.A1, it is not possible to say that it is predominantly a lease and not a mortgage and none of the provisions of Kerala Land Reforms Act confer the benefit of deemed tenancy for the mortgage under Ext.A1 as the qualifying period is less than 20 years from 1.1.1970. It is therefore found that Ext.A1 is not a lease but only a mortgage. Learned District Judge therefore set aside the finding of the Land Tribunal and the trial court held that respondent is entitled to redeem the mortgage. As the value of improvements was not assessed, it was found that it is to be fixed at the final decree. The claim for kudikidappu right if any was left opened to be decided in the final decree. The appeal was allowed and preliminary decree was passed. It is challenged in the second appeal.

3. Though appeal was admitted, no substantial question of law was formulated.

4. Learned counsel appearing for appellants and respondent were heard.

5. Execution of Ext.A1 is admitted. Plaint schedule property admittedly originally belonged to respondent and predecessor in interest of appellants obtained the property under Ext.A1. Ext.A1 though styled as otti kuzhikanam is found to be a mortgage and not a lease by the learned District Judge. Though it was contended that Ext.A1 is not a mortgage but predominantly a lease, learned District Judge interpreted Ext.A1 and found that it is predominantly a mortgage and not a lease. Though benefit under the Kerala Land Reforms Act was claimed, learned District Judge rightly found that the minimum qualifying period to claim tenancy as a deemed tenant under the Kerala Land Reforms Act is not sufficient as on 1.1.1970 and as the period did not expired from the date of Ext.A1, claim is not sustainable. In the light of the factual findings of first appellate court, no substantial question of law is involved in the

appeal. The question whether Ext.A1 amount to a lease or not was rightly decided by learned District Judge in the light of the Full Bench decision of this court in **Velayudhan Vivekanandan v.Ayyappan Sadasivan (1975 K.L.T.1).** The question of value of improvements and whether appellants are entitled to kudikidappu right are all left to be decided in the final decree proceedings. In such circumstance, as no substantial question of law involved in the appeal, appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006